UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Kohler, Wisconsin

SANDERS BROS., INC.,
D/B/A ENCOMPASS INDUSTRIAL SERVICES[1]
Employer

and **Case 30-RC-6471**

UNITED AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA - UAW
Petitioner

DECISION AND DIRECTION OF ELECTION[2]

ISSUES:

The issues presented at hearing are as follows:

1) Whether or not the *Daniels/Steiny* construction formula should be used to determine the employees who are eligible to vote in this unit?

2) If the *Daniels/Steiny* formula is not used, whether the employees transferred from the Gaffney, South Carolina facility since on or about August 1, 2002, are regular employees and, therefore, should be eligible to vote?

3) Whether or not Odell Fields is a supervisor and should be included in the unit?

4) Whether or not Stan Rice is a supervisor and should be included in the unit?

5) Whether or not recently hired employee (and previously employed through a temporary agency) Andrea Sieloff should be included in the unit?

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[1]The name of the Employer appears as amended at hearing.

[2]Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

THE CONTENTIONS OF THE PARTIES

The Employer contends that its work is primarily construction in nature and therefore the *Daniels/Steiny* formula should apply. The Petitioner's position is that the nature of the Employer's business is repair and maintenance work, no different than the work done by employees in a regular production and maintenance unit. If the *Daniels/Steiny* formula is not applied, it is then the Employer's position that the supplemental employees from Gaffney, South Carolina share a sufficient community of interest with the Employer's regular Kohler employees so as to be included in the unit. The Petitioner asserts that the Gaffney employees lack a sufficient community of interest inasmuch as they are based in South Carolina and have no expectancy of remaining in Kohler.

In regards to the issues involving individual employees, the Employer asserts that Fields and Rice are not Section 2(11) supervisors while working at the Kohler facility and therefore should be included in the unit. The Petitioner contends that Fields and Rice should be excluded because they have been held out as supervisors of the Gaffney crew. Regarding Sieloff, the Employer contends that she should be included because she was hired as a full-time permanent employee based out of Kohler prior to the eligibility date. The Petitioner asserts that Sieloff should not be included in the unit, however, Petitioner has set forth no theory as to why Sieloff should be excluded.

DECISION SUMMARY[3]

I find that the Employer is not an employer primarily engaged in the construction industry, and therefore the *Daniel/Stieny* construction formula does not apply. I further find that the employees brought in from Gaffney, South Carolina to supplement the Kohler, Wisconsin crew are equivalent to temporary/dual function/seasonal employees who have no expectancy of being permanent members of the unit and who do not have a substantial interest in working conditions with the Kohler unit. As a result there is no need to decide the supervisory status of Gaffney employees Fields and Rice. I also find that Sieloff is eligible to vote because she was hired as a permanent Kohler unit employee prior to the eligibility date. Therefore the following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by the Employer out of its Kohler, Wisconsin facility; excluding office clericals, temporary staffing cleaning crew, temporary employees, confidential employees, guards and supervisors as defined by the Act.

BACKGROUND

The Employer is a South Carolina corporation that provides maintenance, mechanical and construction services to customers located throughout the United States. The Employer has numerous facilities from coast to coast. In Wisconsin, the Employer has a contract with Kohler Company in Kohler, Wisconsin for purchase orders to provide maintenance, repair and construction service to the Kohler facility. The term of this contract is January 2001 through

[3] The Employer and Petitioner filed post-hearing briefs that were duly considered. The hearing officer's rulings made at the hearing were free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) and Section 2(6) and (7) of the Act.

January 2005. The record indicates that on average, over 80 percent of the Employer's work is classified as maintenance work. Maintenance work is defined as maintaining the current condition of a machine or area such as repairing a self-destructing Wheelabrator every Sunday afternoon. Construction projects are defined as using equipment to relocate or install something new such as the installation of a new floor.

Site Manager, George Ploof, informed employees hired at the Kohler facility that they would be doing overflow maintenance work for Kohler. Employees have testified that to date, that description has been accurate. Employees have often worked side by side with Kohler Company employees performing similar maintenance work. All of the work performed by the regular Wisconsin employees has been for Kohler Company. Although the Employer has occasionally bid on construction projects open to other contractors, the testimony is that it has never received one of the projects.

There are 14 regular Kohler employees working for the Employer in Wisconsin. Regular being defined as employees who were hired at and work at the Kohler facility full-time. There are also approximately 10 employees who were transferred from the Employer's Gaffney, South Carolina location in August of 2002 to provide support to the Kohler employees during what is alleged by the Employer to be a busy period. Six employees, four of whom returned in August, were also sent to Kohler in December of 2001 for approximately 60 days to help with a busy period. Based upon Employer Exhibit 3, there are only two departments at the Kohler facility, Maintenance and Cleaning. Out of the 14 regular Kohler employees, 7 are classified as mechanics and the other 7 are classified as helpers. All of the employees transferred from Gaffney are considered mechanics.

The Gaffney transfers are employees who the Employer, on occasion, dispatches to supplement facilities around the country. None of the Wisconsin employees have ever been transferred out to supplement another facility. While in Wisconsin, the Gaffney employees receive their South Carolina pay scale which is lower than the Wisconsin scale. The employees receive a housing allowance and are left to find their own temporary lodging. The employees are allowed to use a company vehicle off of Kohler's premises, a benefit not shared by the regular Kohler employees. No Gaffney employee has ever remained in Wisconsin after completion of the overflow work that has been assigned. There was no evidence presented that any of the Gaffney employees have intentions of, or is even considering remaining as a full-time employee in Wisconsin.

APPLICABLITY OF *DANIEL/STEINY* FORMULA

I find that the *Daniel/Steiny* formula for eligibility of employees should not be applied because the vast majority of the Employer's work is maintenance in nature and not construction. The *Daniel/Steiny* formula was created by the Board to accommodate the fluctuating nature of employment in the construction industry. *Daniel Construction Co*., 133 NLRB 264 (1961), as modified 167 NLRB 1078 (1967); *Steiny & Co*., 308 NLRB 1323 (1992). The formula is to be used in all cases in which the Employer is primarily engaged in the construction industry unless the parties stipulate not to use the formula. *Signet Testing Laboratories*, 330 NLRB 1 (1999).

The record indicates that the Employer in this case performs predominately work considered to be maintenance in nature. Site Manager Ploof, who was called by the Employer, testified that only 20-25 percent of the Employer's work is considered construction work. He further testified that his 20-25 percent estimate was on the high end. Also, the only testimony in the record from employees performing the work is that they are predominately performing

maintenance and repair work of the same nature as the Kohler Company maintenance employees. Documentation entered into the record by the Employer supports the employees' testimony. There is no construction department at the Employer, no employee is classified as a construction worker, and the description of the work listed in Employer Exhibits 4 and 11, which are memos to the Gaffney crew explaining the work to be performed, is primarily maintenance in nature.

I find that the work the Employer is performing at the Kohler facility is no different than that which is typically included in non-construction, traditional production and maintenance and/or repair units. *Ormet Aluminum Mill Products Corporation*, 335 NLRB No. 65 (2001); *Keeler Brass Automotive Group*, 301 NLRB 769 (1991); *Warner-Lambert Company*, 298 NRLB 993 (1990). Therefore, the *Daniel/Steiny* formula should not be used to determine eligibility.

STATUS OF TRANSFERRED SOUTH CAROLINA EMPLOYEES

I find that as a result of the temporary nature of the Gaffney, South Carolina supplemental employees, they are not eligible to vote in the election for the Kohler facility. Because of the unique circumstances of the Gaffney employees, these employees can be properly analyzed and excluded using any one of three Board standards: as temporary employees, dual-function employees, and seasonal employees.

Temporary employees are those that have an uncertain tenure. If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. *Personal Products Corp*., 114 NLRB 959 (1955). However, the Board has held that:

> The critical inquiry on this date is whether the "temporary" employee's tenure of employment remains uncertain…[The] "date certain" eligibility test for temporary employees….does not require a party contesting an

> employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired. *Boston Medical Center Corporation*, 330 NLRB No. 30 (1999), citing *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992), citing *Pen Mar Packaging Corp*., 261 NLRB 874 (1982).

Although the instant case is somewhat factually different - the employees are constantly employed by the Employer and are never technically "hired" at Kohler - the Board's underlying analysis (reasonable contemplation of continued employment) is still present. This distinction is further evidence as to the temporary nature of the disputed employees. The employees live in South Carolina and there is no evidence that any of these employees intend to stay with the Employer at the Kohler facility. The employees are brought in for a specific overflow period and then are sent back to South Carolina and back to their regular jobs with the Employer. Six of the ten employees were not the same employees who were in Kohler in December. Therefore, it cannot be said that the same employees are always going to be sent to Kohler to supplement the Wisconsin crew. Although the Employer maintains that it makes an effort to send the same individuals back to a site at which they previously worked, there is also testimony that these employees are temporarily shipped to other places around the country when needed. Assuming that there is a next time at Kohler, there is no guarantee that the employees will not be already supplementing a different crew at a different location.

No employee who has been transferred to Kohler to help with overflow has ever remained at Kohler, nor was there testimony that any of the employees have ever considered staying. The temporary nature of the Gaffney employees is further evidenced by the fact that they remain on the South Carolina lower pay scale upon being transferred. There is no effort or

evidence of intention of the Employer to consider these employees as being Wisconsin employees for any extended period of time.

Similarly, for the reasons outlined above, the Gaffney employees would be excluded under a dual-function analysis. The Board, in *Syracuse University*, 325 NLRB 162 (1997), outlined the standard required for an employee to be eligible as a dual-function employee. Employees of the University who were employed by the same employer but were hired short term in another department to help with special events with no expectation of continuing to work in the new department were excluded. Id. The Board reasoned that although the employees performed work similar to those performed by unit employees, it was not for a sufficient period of time to demonstrate that they have a substantial interest in working conditions in the unit. Id.

As stated above, the transferred Gaffney employees are only sent to Kohler to complete the overflow work the Employer alleges it has. The work could last a couple of days or it could last months, however, the undisputed evidence is that the employees will be sent back when the job is done, if not sooner[4]. There is also no guarantee that the employees who worked at the job previously will be sent back the next time help is needed; this is evidenced by the two Gaffney employees who failed to return to Kohler despite having assisted in December of 2001. Based upon the foregoing and the entire record, I find that the Employer has not established that the Gaffney employees will be performing the work of unit employees for a sufficient period of time to demonstrate that they have a substantial interest in working conditions.

The Gaffney employees also fail to qualify for inclusion in the unit under the seasonal employee analysis set forth in *L & B Cooling, Inc*., 267 NLRB 1 (1983). In that case the Board

[4] Although the Employer was in control of the documents that would have provided an estimate of how much "overflow" work is needed, it failed to produce such documents even after prompting by the hearing officer that such evidence was lacking. Furthermore, although the Employer identified a specific project requiring the additional workers in December of 2001, it was unable to give any particular reason why four more workers than in December were needed in August. There was also evidence in the record that at least one of the Employer's admitted supervisors did not know why additional employees were needed.

overruled a Judge's decision and found that migrant workers who harvested crops for the employer should not be included in the unit. The Board reached this conclusion despite the fact that the workers performed the same work, were under the same supervision and were similarly compensated as the core group of workers. The Board found that since the employer was in business for such a short period of time, there was no reliable evidence that there was consistent season-to-season hiring. The present situation is similar to *L & B Cooling* supra, the workers perform maintenance for a short busy season and then move on to another location or back to their home base in South Carolina. The Employer has only transferred employees to work at the Kohler site one other time since obtaining its contract. Four of those employees returned in August and two did not. I find that this is not sufficient evidence to establish that the transferred employees have a reasonable expectation of reemployment with the Employer at the Kohler facility. I have also discounted the weight accorded to the August transfers since they occurred after the filing of the petition[5].

SUPERVISORY STATUS OF FIELDS AND RICE

In light of my ruling finding that all of the Gaffney, South Carolina employees are ineligible to vote in the Kohler election. I find no need to make a determination as to the supervisory status of employees Fields and Rice.

STATUS OF ANDREA SIELOFF

Sieloff was hired as a permanent employee prior to the eligibility date. Petitioner has come forward with no reason why she should not be eligible. Therefore, I find Sieloff to be eligible to vote in the upcoming election.

[5] Although the Employer claims that this transfer of employees was made at the request of Kohler Company officials, it presented no supporting documentation nor, could anyone give a date as to when the contact occurred or who actually made the request.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Automobile, Aerospace & Agricultural Implement Workers of America – UAW.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior*

Underwear, Inc., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company,* 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before August 30, 2002.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by September 6, 2002.**

Signed at Milwaukee, Wisconsin on this 23rd day of August 2002.

/s/Philip E. Bloedorn

Philip E. Bloedorn, Regional Director
National Labor Relations Board
Thirtieth Region
Henry S. Reuss Federal Plaza, Suite 700
310 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

362-6766-1050-0000
362-3350-0000-0000
362-6718-0000-0000